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In The

Supreme Court of the United States

October Term, 1984

JAMES I. GRANN, JOHNNY E. WINSTON, GERALD R. WHITFIELD, JON F. SIPPL, FRANCIS L. RETELLE, STEVEN R. REINSTRA, RICHARD J. MILLER, ROBERT M. LOMBARDO, STEVEN A. KOECKE, RUDOLPH J. JERGOVIC, BERNARD D. HEBARD, WILLIAM S. GILFOY, DENNIS A. GERFEN, LEMUEL B. FRASER, ROBERT J. FAUST, and KENNETH D. COUTURE,

Plaintiffs-Petitioners,

v.

CITY OF MADISON, a municipal corporation,

Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the City of Madison discriminated against the petitioners on the basis of their sex when it complied with a state agency order to promote two female employees on October 24, 1978,

2. Whether the City of Madison discriminated against the petitioners on the basis of their sex when it promoted Belle Stephenson to Policewoman II on August 29, 1974.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT:

I. THIS CASE CONTAINS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT 8

A. Petitioners Cannot Be Characterized As "Employees Adversely Affected" As That Term Has Been Used By Federal Courts In Title VII Litigation. 8

B. Petitioners Have Misstated The Decision Of The Court Of Appeals. 10

C. This Case Raises No Constitutional Issues. 11

1. Constitutional arguments were not raised in the lower courts. 11

2. The facts do not support a claim that any of their constitutional rights are violated. 11

II. THERE IS NO CONFLICT AMONG THE U.S. COURTS OF APPEAL ON ANY ISSUE IN THIS CASE. 13

III. NO PART OF THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. 14

A. There Is No Conflict With This Court's Decision In *Kremer v. Chemical Construction Corporation* 14

TABLE OF CONTENTS—Continued

Pages

B. The Court Of Appeals Decision That Madison's Compliance With The State Agency Order Did Not, In And Of Itself, Constitute Prohibited Discrimination, Is Not Inconsistent With Decisions Of This Court. 15

1. The facts in the instant case are very different from the facts in the cases cited by petitioners. 15

2. Petitioners misunderstand the application of this Court's "seniority" cases to this case. 19

C. The Court Of Appeals Decision Affirming The District Court's Holding That Belle Stephenson's Promotion Did Not Constitute Prohibited Discrimination Is Not In Conflict With Any Decision Of This Court. 21

IV. CONCLUSION: NO WRIT SHOULD ISSUE 23

APPENDIX A ..... App. 1

APPENDIX B ..... App. 5

TABLE OF AUTHORITIES

CASES CITED:

American Tobacco Co. v. Patterson, 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed. 2d 748 (1982) 9

Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967) 11

Dennison v. City of Los Angeles Dept. of Water & Power, 658 F. 2d 694 (9th Cir. 1981) 13

EEOC v. McCall Printing Corp., 633 F. 2d 1232 (6th Cir. 1980) 13

TABLE OF AUTHORITIES—Continued

Pages

Firefighters Local Union No. 1784 v. Stotts, — U.S. —, 104 S.Ct. 2576, 81 L.Ed. 2d 483 (1984) 7, 8, 9, 18, 19, 20, 21

Ford Motor Co. v. EEOC, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed. 2d 721 (1982) 9, 18

Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976) 7, 9, 18, 21

G. D. Searle & Co. v. Cohn, 455 U.S. 404, 102 S.Ct. 1137, 71 L.Ed. 2d 250 (1982) 11

Kremer v. Chemical Construction Corporation, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed. 2d 262 (1982) 14, 15, 17

Michel v. State of Louisiana, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 2d 83 (1955) 11

Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed. 2d 396 (1977) 7, 9, 18, 19, 20, 21

U.S. v. Jefferson County, 720 F. 2d 1511 (11th Cir. 1983) 13

Zipes v. TransWorld Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127 (1982) 23

STATUTES:

12 U.S.C. Sec. 1254(1) 1

28 U.S.C. Sec. 1738 14

42 U.S.C. Sec. 2000(e) 1

Civil Rights Act of 1964 ..... 1, 3

Equal Pay Act, 29 U.S.C. Sec. 206(d) (1) 1

62.13(5m), Wis. Stats. (1981-1982) 8

Sec. 703(h) of Title VII 9, 18

227.01(6), Wis. Stats. 12

TABLE OF AUTHORITIES—Continued

Pages

227.064, Wis. Stats. 12

227.07, Wis. Stats. 12

227.16, Wis. Stats. 12

227.16(a), Wis. Stats. 13

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 738 F.2d 786 (7th Cir. 1984). It appears at 35 FEP Cases 296, and is set forth fully in Appendix A of the petition for writ of certiorari. The opinion of the District Court for the Western District of Wisconsin is not yet officially reported, but appears at 35 FEP Cases 291. It is set forth in Appendix B of the petition for writ of certiorari.

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JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 25, 1984. A petition for writ of certiorari was filed within 60 days. Defendant-respondent's response to the petition has been filed within 30 days after receipt of the petition. This Court has jurisdiction under 28 USC Sec. 1254(1) to grant or deny the petition.

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STATEMENT OF THE CASE

The petitioners are male detectives employed by the City of Madison, Wisconsin. On November 11, 1981, they filed a complaint in the U.S. District Court for the Western District of Wisconsin, alleging that the defendant City of Madison had discriminated against them in their employment on the basis of their sex, violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000(e) et seq., and the Equal Pay Act, 29 U.S.C. Sec. 206(d)(1).

Madison moved for summary judgment, alleging that petitioners' claim was barred by collateral estoppel, because of a state court decision in a similar action brought by another male detective. That motion was denied by the District Court on August 13, 1982.

The case was tried on stipulated facts. These facts are set forth in full in petitioners' Appendix C, pp. 38-50. The District Court, on November 3, 1982, held that Madison had violated Title VII and the Equal Pay Act when it complied with a state agency order to promote certain female detectives in 1978, but that there had been no violation when Policewoman Belle Stephenson was promoted to Policewoman II in 1974. The District Court denied petitioners' request for back pay and denied Madison's request for a stay. The stay was granted by the Court of Appeals for the Seventh Circuit in December, 1982.

The City of Madison filed a timely appeal of the District Court's decisions denying its motion for summary judgment and holding that it had violated Title VII and the Equal Pay Act. The petitioners cross-appealed, alleging that the District Court erred in finding that Madison had not violated Title VII when it promoted Belle Stephenson in 1974, and in refusing to order back pay.

The Court of Appeals, on June 25, 1984, affirmed the decisions of the District Court denying Madison's motion for summary judgment and finding no discrimination in the promotion of Belle Stephenson. The Court of Appeals reversed the decision of the District Court finding Madison had violated Title VII and the Equal Pay Act when it complied with the state agency's order to promote the former Policewomen to Detective Supervisor.

Petitioners filed a timely petition to this Court for a writ of certiorari. Madison has filed no cross-petition and accepts the ruling of the Court of Appeals on its motion for summary judgment.

Title VII of the Civil Rights Act of 1964, forbidding employment discrimination because of sex, was amended in 1972 to cover municipal employment. At that time, the Madison Police Department hired only male Police Officers and hired women only as Policewomen. (Pet. App. C, pp. 43, 46) Policewomen were assigned only to the Crime Prevention Bureau and were not allowed to attend police training classes (Pet. App. C, p. 43) or work as Patrolmen or Police Officers. They were not allowed to compete for positions as Detectives, or any other position except Policewoman I and Policewoman II. (Pet. App. C, p. 46) The highest grade a woman could achieve, Policewoman II, was paid at Pay Range 4, and Detectives were paid at Pay Range 5. (Pet. App. C, pp. 43, 46)

Also in 1972, the City decided to create a new Detective classification at a lower pay range. (Pet. App. C, p. 45) This decision was based on a consultant's report which recommended that the pay differential between Detectives and Police Officers be decreased. (Pet. App. C, p. 44) Thus, all persons promoted to Detective after April, 1972, including all the plaintiffs, have been paid at Pay Range 3. (Pet. App. C, p. 45) At the same time, it was decided not to lower the pay of the incumbent Detectives. Instead, they were "grandfathered" in Range 5, and were retitled "Detective Supervisor" with no change in duties. (Pet. App. C, p. 45) All of the Detective Supervisors were males. (Pet. App. C, p. 45)

Not long after this change was complete, on September 3, 1972, George Croal, then a Police Officer, was promoted to Detective.

Late in 1973, the Chief of Police reorganized the Department, eliminating the Crime Prevention Bureau, creating an Investigative Services Bureau and assigning Policewomen, Detectives and Detective Supervisors to the Bureau. (Pet. App. C, p. 45) All of the Policewomen, Detectives and Detective Supervisors were assigned to perform the same duties. (Pet. App. C, pp. 39, 45) These organizational changes involved no changes in classification or pay.

Late in the following year, 1974, the Policewomen were retitled Detective II to eliminate the sex designation from the job title. There was no change in pay or duties. (Pet. App. C, p. 45)

On October 21, 1974, Detective George Croal filed a complaint of sex discrimination with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations, alleging that the City of Madison violated Wisconsin's Fair Employment Act by paying him a base salary lower than that received by the female Policewomen or Detective II's who performed the same work. (Pet. App. C, p. 48) He filed the same complaint with the U.S. Equal Employment Opportunity Commission.

In December, 1975, two of the Detective II's, Mary Otterson and Mary Ostrander, filed a discrimination complaint with the Equal Rights Division of the Wisconsin

Department of Industry, Labor and Human Relations. (Pet. App. C, p. 49)

On September 30, 1976, the Department held a hearing on Detective Croal's complaint of discrimination. The hearing was held before a hearing examiner, who recommended the complaint be dismissed. (Pet. App. C, p. 48) On November 18, 1978, the Labor and Industry Review Commission affirmed the hearing examiner's recommended findings and order.

Detective Croal appealed the order of the Labor and Industry Review Commission to Dane County Circuit Court. (Pet. App. C, p. 48)

Also late in 1978, the Department of Industry, Labor and Human Relations found that the City had discriminated against the former Policewomen. (Pet. App. C, p. 47) The Department ordered the city to promote the former Policewomen to Detective Supervisor, Pay Range 5, and to pay back pay. The City complied with the order and did not appeal. (Pet. App. C, p. 47)

Petitioners Grann, Winston, Whitfield, Sippl, Retelle, Reinstra, Miller, Lombardo, Koecke, Jergovic, Hebard, Gilfoy, Gerfen, Fraser, Faust, and Couture then filed a complaint similar to Croal's complaint, both with the Wisconsin Department of Industry, Labor and Human Relations, and with the U.S. Equal Employment Opportunities Commission. (Pet. App. C, p. 48; Resp. App. A) Both agencies issued determinations finding no probable cause to believe the law had been violated. (Pet. App. C, p. 48)

On February 27, 1980, the Dane County Circuit Court, Judge Currie presiding, issued a memorandum decision and judgment affirming the order of the Labor and Industry Review Commission, dismissing Detective Croal's complaint. (Pet. App. C, p. 48) Detective Croal filed an appeal to the Court of Appeals, but dismissed it voluntarily on June 5, 1980. (Pet. App. C, p. 49)

Detective Croal filed an action in the U.S. District Court for the Western District of Wisconsin, Case No. 81-C-450, on July 14, 1981 and petitioners filed this action on November 10, 1981. The two actions were consolidated and Croal's complaint was later dismissed.

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SUMMARY OF ARGUMENT

Defendant-respondent, the City of Madison, argues that, on the facts of this case, petitioners cannot accurately be characterized as "employees adversely affected" by an order to remedy discrimination. The Court of Appeals decision is in fact more limited than they claim. It does not result in precluding affected co-workers from challenging orders remedying discrimination. Nor are there any constitutional arguments raised by the facts of this case. Thus, they do not demonstrate the existence of any important federal question which should be settled by this Court. Neither have they demonstrated that the Courts of Appeal have made conflicting decisions on any issue in this case.

Petitioners have failed to cite decisions of this Court which conflict with the holding of the Court of Appeals in this case. The only cases they cite are those which deal with competitive seniority awarded as a remedy in class action or "pattern and practice" suits, such as *Firefighters Local Union No. 1784 v. Stotts*, — U.S. —, 104 S.Ct. 2576, 81 L.Ed. 2d 483 (1984); *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed. 2d 396 (1977); and *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976). These cases do not conflict with the decision of the Court of Appeals in this case. They hold that a class member who is "affected" by the acts held to be discriminatory is entitled to a remedy.

In the instant case, the stipulated facts establish that the female Detective II's, whose state-ordered remedy is attacked by petitioners as violative of their rights, were "affected" by the prior Police Department policy which made street duty, training classes, and competition for promotion unavailable to them. Thus, the promotion which the state agency ordered as their remedy is in no way inconsistent with decisions of this Court. Nor does any decision of this Court hold that such a remedy conflicts with the rights of co-workers or constitutes prohibited discrimination.

Defendant-respondent argues that petitioners have offered this Court no reason why a writ of certiorari should be granted.

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ARGUMENT

I. This Case Contains No Important Question Of Federal Law Which Has Not Been, But Should Be Settled By This Court.

A. Petitioners Cannot Be Characterized As "Employees Adversely Affected" As That Term Has Been Used By Federal Courts In Title VII Litigation.

Petitioners repeatedly characterize themselves as "employees adversely affected" by a state administrative agency decision (Petition, pp. 10, 11, 12, 17, 18) and cite the facts in *Firefighters Local Union No. 1784 v. Stotts,* — U.S. —, 104 S.Ct. 2576, 81 L.Ed. 2d 483 (1984), as analogous to their situation. In fact, their case is very different.

Petitioners claim that the state agency's order affects their seniority rights.

The plaintiffs in *Stotts,* however, relied on their seniority rights, as guaranteed by Title VII, to protect them from layoff. In Wisconsin, police department layoffs and recall rights are governed by statute, and depend upon total time in police department employment. See Sec. 62.13(5m), Wis. Stats. (1981-1982). The petitioners have stipulated that their rights to longevity pay and to protection from layoff are not affected by the events which they dispute. (Pet. App. C, pp. 49, 50)

The stipulated facts establish that the rights governed in petitioner's contract by "classification seniority" are limited to choice of vacation time, choice of work schedule, and choice of job assignment. (Pet. App. C, p.

49) The extent of the "adverse effect" is that, in case there are more requests for a particular vacation period, a particular work schedule, or particular job assignment than can be accommodated by management under given workload conditions, one of the petitioners might have to give way to the preference of one of the four women detective supervisors. (Pet. App. C, pp. 49, 50) That is the full extent of the "adverse effect".

The Court of Appeals, in its memorandum decision, emphasized the minimal effect upon the petitioners of the events which they complain of. (Pet. App. A, pp. 19, n.5, 21, 11) Petitioners have never, at any stage of the proceedings, claimed the protection of Sec. 703(h) of Title VII, because the facts do not support any such claim. Yet they attempt to place themselves in the position of "adversely affected" employees such as those in *Stotts,* supra; *Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed. 2d 396 (1977); and *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976).

Petitioner's reference to this limited effect upon their "classification seniority" (Pet. App. C, pp. 49, 50), as affecting their "seniority rights" is disingenuous. The term "seniority", as it is used in Sec. 703(h) of Title VII and cases which interpret that section, is understood to include some of the most important benefits and burdens of employment, including retention of the job itself. *Ford Motor Co. v. EEOC,* 458 U.S. 219, 102 S.Ct. 3057, 3070, 73 L.Ed. 2d 721 (1982) citing *American Tobacco Co. v. Patterson,* 456 U.S. 63, 102 S.Ct. 1534, 1541, 71 L.Ed. 2d 748 (1982), and *Franks v. Bowman Transportation Co.,* 424

U.S. 747, 766-767, 96 S.Ct. 1251, 1265, 47 L.Ed. 2d 444 (1976).

In contrast, only minimal benefits and burdens are at stake here.

B. Petitioners Have Misstated The Decision Of The Court Of Appeals.

Petitioners allege that the decision of the Court of Appeals denies an adversely affected employee a right to challenge a state administrative order in the federal courts. (Petition, p. 11) The court's ruling is by no means so broad.

Rather, the Court of Appeals held that, on the facts of this case, admittedly unique, Madison's compliance with the state agency order did not violate the petitioners' federal statutory rights. This holding was based on a careful examination by the Court of Appeals of the provisions of Wisconsin's Fair Employment Act and of Title VII and on its finding that the two laws are consistent with each other. (Pet. App. A, p. 15) Furthermore, the Court of Appeals found that the state agency's remedial order was reasonable under the circumstances. (Pet. App. A, p. 21) Finally, the court pointed out that petitioners were affected only minimally by the remedial order (Pet. App. A, pp. 21, 22) and that Wisconsin's Administrative Procedure Act would have permitted them to be parties to the agency proceeding. (Pet. App. A, p. 23)

Contrary to petitioner's allegation (Petition, p. 11), employees who challenge a state administrative order which conflicts with Title VII, who can show actual adverse effects or who are denied the right to participate

in state proceedings, will not be prevented by this Court of Appeals' decision from vindicating their federal rights.

C. This Case Raises No Constitutional Issues.

1. Constitutional arguments were not raised in the lower courts.

Petitioners have at all times argued that the effect of the state agency order interfered with their rights under Title VII and the Equal Pay Act. This was the subject of their administrative complaint to the EEOC, and of their complaint filed in the District Court. (Resp. App. A, B) At no time, prior to their petition to this Court, have they asserted that the effect of the state agency order affected their constitutional rights.

Now petitioners argue that they have been denied due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

This court should not consider this argument at this late date. See *G. D. Searle & Co. v. Cohn,* 455 U.S. 404, 102 S.Ct. 1137, 1144, 71 L.Ed. 2d 250 (1982). See also *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 1985, 18 L.Ed. 2d 1094 (1967), citing *Michel v. State of Louisiana,* 350 U.S. 91, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955).

2. The facts do not support a claim that any of their constitutional rights are violated.

The petition does not state precisely how petitioners have been denied their right to due process of law. They do claim that the Court of Appeals denied their due process rights by its observation that, under Wisconsin law,

they could have intervened in the state agency proceeding which culminated in the remedial order to which they object. (Petition, pp. 11,12)

Their claim that they would have had only 30 days in which to intervene (Petition, p. 12) is inaccurate. Wisconsin's Administrative Procedure Act contains liberal intervention provisions. The Court of Appeals cited Secs. 227.01(6), 227.064 and 227.16, Wis. Stats. Those and other relevant provisions are set forth in the appendix to Petitioners' brief at pages 51-62.

First of all, Chapter 227 places no time limit on their request to be admitted as parties. See Secs. 227.01(6), 227.064 and 227.07, Wis. Stats. Section 227.01(6), Wis. Stats. contains a liberal definition of the term "party" as it is used in Chapter 227:

> 227.01 Definitions. In this chapter:
>
> * * *
>
> (6) "Party" means each person or agency named or admitted as a party. Any person whose substantial interests may be adversely affected by any proposed action in a contested case shall be admitted as a party.

If petitioners' rights are affected to the degree that they claim, they would have had a right under this section to be parties at all stages of the agency proceedings on the women's complaint.

Chapter 227 also creates a liberal right of affected persons to a hearing. See Sec. 227.064, Wis. Stats. (Pet. App. 51) They would have had a right to the same notice of hearing received by other parties, to participate in the

hearing as parties, and to seek judicial review of the agency's order.

Section 227.16(a), Wis. Stats., provides that petitions for review must be filed within thirty (30) days after service of the agency's decision upon all parties, but that limitation could not constitute a denial of due process. Their petition does not cite any other set of facts which could constitute a denial of due process of law.

II. There Is No Conflict Among The U.S. Courts Of Appeal On Any Issue In This Case.

Petitioners emphasize the statement of the Court of Appeals that this is a case of first impression. (Petition, p. 10) Nevertheless, they also claim that there is a conflict among the Courts of Appeal for the various circuits. (Petition, p. 19) In fact, no Court of Appeals has ruled on the precise issue dealt with by the Court of Appeals for the Seventh Circuit in this case, but three other circuits are in agreement on analogous issues.

Petitioners cite three cases as indicating a conflict among the U.S. Courts of Appeal on the issues in this case: *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980); *Dennison v. City of Los Angeles Dept. of Water & Power,* 658 F.2d 694 (9th Cir. 1981); and *U.S. v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983). Petitioners do not point to any issues on which these decisions differ with each other, or with the decision of the Court of Appeals in this case.

In fact, each of these decisions was cited as authority by the Court of Appeals in its memorandum decision

(Pet. App. A, pp. 18, 20, 21), and in each, the arguments of plaintiffs who claimed to be "adversely affected non-minority employees" were rejected These cases are perfectly consistent with the decision of the Court of Appeals for the Seventh Circuit in the instant case.

III. No Part Of The Court Of Appeals Decision Is In Conflict With Decisions Of This Court.

A. There Is No Conflict With This Court's Decision In Kremer v. Chemical Construction Corporation.

The issue before this court in *Kremer v. Chemical Construction Corporation,* 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed. 2d 262 (1982) did not arise in the instant case.[1] *Kremer* had to do with the relationship between state and federal proceedings on the same complaint.

This court's decision in *Kremer,* supra, is based upon the provisions of 28 USC Sec. 1738. That statute has nothing to do with this case. As petitioners point out (Petition, p. 13), they were not obliged to pursue in state court the state's unfavorable administrative action on their claim. *Kremer,* supra, at 102 S.Ct. 1891. Nothing in the Court of Appeals decision indicates its disagreement on that point.

Rather, this case involves the effect upon petitioners of a state agency decision, not in their own case, but in

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1. Madison had argued, based on *Kremer,* supra, that petitioners' claim was collaterally estopped by a related proceeding brought unsuccessfully by Detective Croal. Both the District Court and the Court of Appeals dismissed that argument and Madison has not pursued it further.

the case of their female co-workers; a related, but different complaint.

The Court of Appeals did not hold that the state agency order had preclusive effect. Rather, it held that, under the circumstances, Madison's compliance with the state agency order constituted a substantive defense. The state agency's order barred petitioners' suit not because of collateral estoppel, but because the agency order enforced the right of a protected group to be free from discrimination. (Pet. App. A, p. 17)

The Court of Appeals decision in the instant case is consistent with this court's opinion in *Kremer,* supra. The majority in *Kremer,* supra, emphasized that "State anti-discrimination laws . . . play an integral role in the Congressional scheme . . ." *Kremer,* supra, at 102 S.Ct. 1890. The Court of Appeals decision in the instant case is based upon the same analysis of the important role Congress intended state regulation to play in the elimination of employment discrimination.

B. The Court Of Appeals Decision That Madison's Compliance With The State Agency Order Did Not, In And Of Itself, Constitute Prohibited Discrimination, Is Not Inconsistent With Decisions Of This Court.

1. The facts in the instant case are very different from the facts in the cases cited by petitioners.

The District Court adopted the parties' stipulation of facts as its Findings of Fact. (Pet. App. B, p. 25) Those Findings of Fact show that before 1972, pay scales for investigative officers in the Madison Police Department were as follows: (Pet. App. B, p. 26)

Pay Range		*Position*
4	(All Women)	Policewoman II
5	(All Men)	Detective

As a result of a consultant's report in 1971, the detective position was lowered to Pay Range 3. Incumbent detectives were "grandfathered" at Pay Range 5 and retitled "Detective Supervisor". All detectives promoted after the effective date of the new policy would be paid at Pay Range 3. The pay scales after 1972 were as follows: (Pet. App. B, p. 27)

Pay Range		*Position*
3	(All Men)	Detective
4	(All Women)	Policewoman II
5	(All Men)	Detective Supervisor

In 1973, investigation services were reorganized so that male and female detectives all performed the same duties. Job titles were changed to remove sex designations. The pay scales and titles were then as follows: (Pet. App. B, p. 27)

Pay Range		*Position*
3	(All Men)	Detective
4	(All Women)	Detective II
5	(All Men)	Detective Supervisor

It was stipulated that, after late 1973, all detectives performed the same duties. (Pet. App. C, p. 48) The District Court did not find that this situation violated any right of petitioners and, in fact, petitioners did not argue that it did. The Court of Appeals was not asked to find that this situation constituted prohibited discrimination.

Yet it is important to note that this is the pay situation that existed before the acts complained of took place.[2]

In 1975, two women, Detective II's, filed a complaint with the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations (DILHR) alleging sex discrimination. (Pet. App. B, p. 27). Madison defended, but DILHR found that Madison had discriminated against them, in violation of Wisconsin's Fair Employment Act, and ordered Madison to promote the two to Detective Supervisor at Pay Range 5. Madison did not seek judicial review, but complied with the order. (Pet. App. C, p. 47)

Petitioners alleged that this compliance discriminated against them in two ways: (1) the women received a pay raise unavailable to them, while work was equal; (2) Madison not only promoted the two complainants as ordered by the agency, but also voluntarily promoted the remaining three female Detective II's who had not filed any complaint. (Petition, pp. 20, 21)

The District Court found all the promotions to be discriminatory, in violation of Title VII. (Pet. App. B, pp. 30, 31) The Court of Appeals reversed, finding neither action prohibited. (Pet. App. A, pp. 18-22) Petitioners claim this holding is inconsistent with decisions of this Court (Petition, pp. 17-20) affecting seniority rights of

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2. Detective Croal had complained of this situation and it was this complaint which had been dismissed by the state court. (Pet. App. B, p. 34) Croal's complaint to the District Court, based on the same fact situation, was dismissed by the District Court because of this court's holding in *Kremer*, supra.

"adversely affected non-minority employees" and affecting the showing necessary by discriminatees who wish to avail themselves of remedial orders.

First, it must be emphasized that petitioners have never claimed that Madison has violated the provisions of its collective bargaining agreements. At no time have they claimed that any of the actions they challenge were taken in violation of the collective bargaining agreements in effect between the parties. Thus, to the extent that any of the decisions of this Court which they consider applicable are based upon violations of agreements between the parties, those decisions do not apply to this case.

Next, as has already been explained, petitioners have not suffered any effects on their seniority rights in the manner that non-minority employees suffered in *Stotts,* supra, in *Teamsters,* supra, in *Franks,* supra, or in *Ford Motor Co. v. EEOC,* supra.

The challenged state agency order awarding promotions to the women detectives included no order of non-competitive seniority of the type that was challenged in those cases. The promotion did include higher "classification seniority" which affects only areas where, by contract, employees are allowed certain limited choices.

The District Court, finding in petitioners' favor, made no reference to seniority rights. (Pet. App. B, p. 30) Neither did their administrative complaint to the EEOC or their complaint (pleading) in the District Court (Resp. App. A, B), make any reference to seniority or to Sec. 703(h) of Title VII. They complained of unequal pay for equal work and the District Court and the Court of Appeals dealt with their complaint on those terms.

2. Petitioners misunderstand the application of this Court's "seniority" cases to this case.

Finally, petitioners have misunderstood the holdings of the cited cases regarding the showing which a discriminatee must make in order to qualify for a remedy. In *Stotts,* supra, the District Court had issued, and the Court of Appeals (6th Cir.) upheld, an injunction under which recently hired black firefighters would be protected from layoff, in preference to white firefighters with greater seniority. The protected black firefighters need not have been plaintiffs in the lawsuit which precipitated the consent decree. In fact, they would not even have had to be eligible for employment as firefighters when the suit was filed. They might even have been under 18 years of age.

It is that situation this Court refers to when it says ". . . mere membership in the disadvantaged class is insufficient to warrant a seniority award." *Stotts,* supra, at 104 S.Ct. 2588.

Petitioners confuse the steps necessary to establish a right to a remedy in a class action and in an individual case.

In the *Stotts* case, as this Court pointed out, there had been no finding that any of the blacks protected from layoff had been a victim of discrimination and there had been no remedy awarded to any of them before the injunction was amended. That was not the situation with the policewomen.

The female detectives were not "mere members of a disadvantaged class". Their suit was not a class action or a "pattern and practice" suit, as were *Stotts, Teamsters,* etc. They were individual complainants and, had

they not shown themselves to be affected by the claimed discrimination, they could not have prevailed in their suit.

The two policewomen had not been allowed to attend police training classes with men, and had not been allowed to compete for promotion of any kind. (Pet. App. C, p. 43) Those discriminatory practices "had an impact on them". *Stotts,* supra, at 104 S.Ct. 2588. As the Court of Appeals pointed out, plaintiffs offered no reason to doubt that the women had the ability to be detectives. (Pet. App. A, p. 22) The Court of Appeals was offered no reason to doubt the necessity or propriety of the remedy ordered by the state agency.

Nor did the former policewomen have any obligation to prove that they would have been promoted to Detective, had they been allowed to compete. Petitioners have misconstrued this Court's holding in *Teamsters v. U.S.,* supra. That case was a class action and it included preferential seniority as a remedy; yet this Court did not require each class member to prove he applied for the job he was discriminatorily denied. Rather, this Court said:

> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. 431 U.S. at 366, 97 S.Ct. at 1870.

If petitioners are arguing that the former Policewomen II's had to show that, had they been permitted to take the Detective examination, they would have been selected as Detectives, the above quoted language from this Court's decision in *Teamsters,* supra, makes abundantly clear that no such requirement exists.

Petitioners rely on the same misunderstanding of this Court's holdings in *Stotts,* supra, *Teamsters,* supra, and *Franks,* supra, for their claim that Madison violated Title VII when it voluntarily promoted three former policewomen whose situation was the same as the two who filed complaints but who, themselves, filed no complaints.

First, it should be noted that petitioners do not claim this unilateral act affected them in any way. Petitioners remained at Pay Range 3 while the three former Policewomen II's were raised from Pay Range 4 to Pay Range 5. Thus, while the former Policewomen II's would be paid more than petitioners, that had always been true.

None of the former Policewomen II's received competitive seniority, except for the "classification seniority" already discussed.

Nor did petitioners offer any evidence which would have shown that the three non-complainants, or any one of them, had been affected differently by the prior sex discrimination in the Police Department than the two former Policewomen II's who filed complaints.

In short, petitioner's objection to these promotions is the same as their objection to the first two promotions. It is based on their mistaken belief that this Court in *Stotts, Teamsters,* and *Franks,* supra, held that a victim of discrimination must prove he or she *would have been promoted* but for discrimination. Those cases contain no such holding.

C. The Court Of Appeals Decision Affirming The District Court's Holding That Belle Stephenson's Promotion Did Not Constitute

Prohibited Discrimination Is Not In Conflict With Any Decision Of This Court.

Petitioners offered no decision of this Court which might conflict with the decisions of both lower courts on this issue. The District Court pointed out that Stephenson had served longer as a Policewoman II than all but one of the petitioners had served as a Detective. (Pet. App. B, pp. 29, 30) The Court of Appeals stressed that merely removing all the barriers to promotion would not have placed Stephenson in the position she would have occupied had there never been discrimination. (Pet. App. A, p. 9)

Because both lower courts found the promotion not to be discriminatory, they declined to consider Madison's procedural arguments. (Pet. App. A, pp. 9, 10; Pet. App. B, p. 30) It should be noted, however, that the pleadings contain no mention of Stephenson's promotion from Policewoman to Policewoman II. Although it took place in 1974, it was not the subject of a timely administrative complaint. Petitioner's administrative complaints, based only on the higher pay paid to the two former policewomen who were the subject of the state agency's remedial order, were timely filed in April, 1979. (Pet. App. C, p. 48; Resp. App. A, B)

Stephenson's promotion is irrelevant to petitioners' allegations of pay discrimination because other females were receiving higher pay than petitioners for the same work both before and after Stephenson was promoted. As an individual act of discrimination, however, neither of the two lower courts had jurisdiction to consider it because it was an issue not raised by the pleadings, and

not the subject of a timely administrative complaint. See *Zipes v. Transworld Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127 (1982).

IV. CONCLUSION: NO WRIT SHOULD ISSUE.

The petition in this case fails to meet any of the criteria established in this Court's Rule 17 for the issuance of writs of certiorari. The facts are unique, and thus will almost certainly never arise again anywhere. Petitioners have pointed to no important question of federal law which has not been, but should be settled by this Court Nor have they shown that there exists an issue on which there is conflict in the Courts of Appeal, or that there is any inconsistency between the Court of Appeals decision in this case and any decisions of this Court. There is no reason for a writ to issue.

Respectfully submitted,

HENRY A. GEMPELER
City Attorney

EUNICE GIBSON
Assistant City Attorney

September 19, 1984

APPENDIX A

STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION
EQUAL RIGHTS DIVISION

KENNETH D. COUTURE; ROBERT J. FAUST; LEMUEL B. FRASER; DENNIS A. GERFEN; WILLIAM S. GILFOY; BERNARD D. HEBARD; RUDOLPH J. JERGOVIC; STEVEN A. KOECKE; ROBERT M. LOMBARDO; RICHARD J. MILLER; STEVEN D. REINSTRA; FRANCIS L. RETELLE; JON F. SIPPL; GERALD R. WHITFIELD; JOHNNY E. WINSTON and JAMES I. GRANN,

Complainants,

v.

CITY OF MADISON, POLICE DEPARTMENT,

Respondent.

COMPLAINT OF DISCRIMINATION

Complainants, through their attorneys, Lawton & Cates by Richard V. Graylow, complain of the discriminatory employment practices of the Madison Police Department (MPD) as follows:

1. All Complainants are males occupying the rank classification of Detective in the Police Department of the City of Madison, Madison, Dane County, Wisconsin. The Police Department is located at 211 South Carroll Street, Madison, Wisconsin. Its Chief Executive Officer is Chief David C. Couper of the same business address. The names

of the Complainants and their effective dates of promotion or entry to the rank classification of Detective follows hereafter:

ERD #7900028(a)	Kenneth D. Couture	3/13/78
#7900029(b)	Robert J. Faust	8/25/74
#7900030(c)	Lemuel B. Fraser	8/25/74
#7900031(d)	Dennis A. Gerfen	7/2/78
#7900032(e)	William S. Gilfoy	6/1/75
#7900033(f)	Bernard D. Hebard	9/3/72
#7900034(g)	Rudolph J. Jergovic	8/6/78
#7900035(h)	Steven A. Koecke	1/11/76
#7900036(i)	Robert M. Lombardo	6/1/75
#7900037(j)	Richard J. Miller	8/25/74
#7900038(k)	Steven D. Reinstra	7/2/78
#7900039(l)	Francis L. Retelle	6/1/75
#7900040(m)	Jon F. Sippl	1/11/76
#7900041(n)	Gerald R. Whitfield	8/25/74
#7900042(o)	Johnny E. Winston	3/5/78
#7900043(p)	James I. Grann	8/25/74

2. All Complainants herein are entitled to the protection and benefits accorded by Section 111.31 et seq., Wis. Stats. All are "employees" within the meaning of the Fair Employment Act (FEA).

3. The City of Madison was and continues to be a City of the second class and an "employer" as defined in Section 111.32, Wis. Stats. At all times material hereto, the City of Madison was the employer of all named Complainants.

4. All Complainants have for varying periods of time prior to and inclusive of the date of this complaint been performing duties and responsibilities identical to those performed by the following sworn commissioned personnel, each of whom are females:

(a) Mary R. Ostrander; and

(b) Mary F. Otterson.

5. Even though the work of the Complainants and the work of Ostrander and Otterson was and continues to be substantially similar, the wages paid to these Complainants have been substantially less.

6. The Complainants have been discriminated against by the City of Madison because of their sex.

WHEREFORE, These Complainants, individually and collectively, request the entry of remedial Orders providing as follows:

1. Adjudicate the conduct of the City of Madison as described herein as unlawful;

2. Prohibit the perpetuation and continuation of the described illegal conduct in the future.

3. Award full back pay and fringe benefits equalling those paid and accorded to Ostrander and Otterson; and

4. Provide for such other and further relief as may be appropriate in these circumstances.

Dated this 20 day of December, 1978.

/s/ Richard V. Graylow
LAWTON & CATES
By: Richard V. Graylow
110 East Main Street
Madison, WI 53703

Attorneys for Complainants

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

JAMES I. GRANN, being first duly sworn, on oath deposes and says that he is a Complainant herein; that he has read the foregoing complaint of discrimination and knows the contents thereof; that the same is true to his own knowledge except as to matters therein stated on information and belief; and that as to such matters he believes the same to be true.

/s/ James I. Grann III

Subscribed and sworn to before me
this 18 day of December, 1978.

/s/ Richard V. Graylow
NOTARY PUBLIC, Dane County, Wisconsin
My commission: Permanent

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES I. GRANN, JOHNNY E. WINSTON, GERALD R. WHITFIELD, JON F. SIPPL, FRANCIS L. RETELLE, STEVEN R. REINSTRA, RICHARD J. MILLER, ROBERT M. LOMBARDO, STEVEN A. KOECKE, RUDOLPH J. JERGOVIC, BERNARD D. HEBARD, WILLIAM S. GILFOY, DENNIS A. GERFEN, LEMUEL B. FRASER, ROBERT J. FAUST, and KENNETH D. COUTURE,

Plaintiffs,

vs.

CITY OF MADISON, a municipal corporation,

Defendant.

COMPLAINT
(Filed November 10, 1981)

The plaintiffs, by their attorneys, Bell, Metzner & Gierhart, S.C., allege the following claim for relief:

JURISDICTION

Jurisdiction of this court is founded on the existence of a federal question. The action arises under 42 U.S. Code, §2000E(f) (3) and 28 U.S. Code §1343(4).

IDENTIFICATION OF THE PARTIES

(1) Plaintiff, James I. Grann, is an adult who resides at 5313 Camden Road, Madison, Wisconsin. He is employed by the City of Madison as a police detective.

(2) Plaintiff, Johnny E. Winston, is an adult who resides at 15 Lake Shore Court, Madison, Wisconsin and is employed by the City of Madison as a police detective.

(3) Plaintiff, Gerald R. Whitfield, is an adult who resides at 14 Starr Court in the City of Madison. He is employed by the City of Madison as a police detective.

(4) Plaintiff, John F. Sippl, is an adult who resides at Six Stacey Lane in the City of Madison and is employed by the City of Madison as a police detective.

(5) Plaintiff, Francis L. Retelle, is an adult who resides at 2239 Commonwealth Street in the City of Madison. He is employed by the City of Madison as a police detective.

(6) Plaintiff, Steven R. Reinstra, is an adult who resides at 1022 Northland Street in the City of Madison and is employed by the City of Madison as a police detective.

(7) Plaintiff, Richard J. Miller, is an adult who resides at 1218 Iowa Drive in the City of Madison and is employed by the City as a police detective.

(8) Plaintiff, Robert M. Lombardo, is an adult who resides at 5402 Voges Road in the City of Madison and is employed by the City as a police detective.

(9) Plaintiff, Steven A. Koecke, is an adult who resides at 5005 Woodburn Street in the City of Madison and is employed by the City as a police detective.

(10) Plaintiff, Rudolph J. Jergovic, is an adult who resides at 4222 Tomscott Trace in the City of Madison and is employed by the City as a police detective.

(11) Plaintiff, Bernard D. Hebard, is an adult who resides at 4313 Mandrake Street in the City of Madison and is employed by the City as a police detective.

(12) Plaintiff, William S. Gilfoy, is an adult who resides at 5409 Painted Post Road in the City of Madison and is employed by the City as a police detective.

(13) Plaintiff, Dennis A. Gerfen, is an adult who resides at 1616 Madison St. in the City of Madison and is employed by the City as a police detective.

(14) Plaintiff, Lemuel B. Fraser, is an adult who resides at 2027 East Mifflin Street in the City of Madison and is employed by the City as a police detective.

(15) Plaintiff, Robert J. Faust, is an adult who resides at 1937 Thackery Street in the City of Madison and is employed by the City as a police detective.

(16) Plaintiff, Kenneth D. Couture, is an adult who resides at Six Manor Hill in the City of Madison and is employed by the City as a police detective.

(17) The defendant is a municipal corporation existing by virtue of the law of the State of Wisconsin.

(18) The plaintiffs above named on or about September 1, 1981 received Notice of Right to Sue letters issued by the U.S. Justice Department advising them that they had 90 days from the date of receipt of the Notice of Right to Sue letter to file in the United States District Court, civil actions under Title VII of the Civil Rights Act of 1964 as amended by 42 U.S. Code §2000E et seq. By virtue of receipt of the Notice of Right to Sue letters, this court has jurisdiction over the claims for relief set forth below.

FIRST CLAIM FOR RELIEF

(1) The plaintiffs above named have been employed by the defendant as detectives at a base pay level of Grade "03."

(2) The defendant has employed two female employees, Belle Stephenson and Mary Otterson. In 1973 Stephenson and Otterson were reclassified as "Detective II" by the defendant. They were given a base pay range one grade above that of the plaintiffs.

(3) In 1977 the two female employees were raised to a pay grade of "05" and were reclassified as "Detective Supervisors" by the defendant.

(4) All plaintiffs have for varying periods of time prior to and inclusive of the date of this complaint been performing duties and responsibilities identical to those performed by Mary Otterson and Belle Stephenson. The plaintiffs above named have had the same job description, have been given the same assignments, and have done work which has been no less demanding than that given to the female employees.

(5) The defendant has discriminated against the plaintiffs above named by paying them at a lower rate of compensation, because of their sex, than has been paid to the two female employees, in violation of 42 U.S. Code §2000E et seq.

SECOND CLAIM FOR RELIEF

(6) Reallege and incorporate herein by reference as if set forth in full paragraphs 1 through 5 inclusive.

(7) The plaintiffs above named and the two female detective supervisors have worked and continue to work under similar conditions. Equal skill, effort and responsibility are required of them.

(8) On the basis of sex, the defendant pays the female employees higher base wages for equal work done by

the plaintiffs, in violation of 29 U.S. Code §206(d), the Equal Pay Act.

WHEREFORE, the plaintiffs demand judgment as follows:

(a) For back pay and fringe benefits equaling those paid and accorded to the female employees;

(b) For elevation to Grade "05" and promotion to the rank of Detective Supervisors.

(c) For costs and disbursements, including actual attorney fees incurred by the plaintiffs in this action.

DATED this 10th day of November, 1981.

BELL, METZNER & GIERHART, S.C.
By: /s/ Mark P. Wenderoff
Attorneys for Plaintiffs.

P. O. ADDRESS:
Suite 500, United Bank Building
222 West Washington Avenue
Post Office Box 1807
Madison, Wisconsin 53701

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A UNITED STATES MAGISTRATE

United States Magistrate William L. Gansner has been specially designated by this court to conduct any and all proceedings, including jury and nonjury trials, in those civil cases in which all of the parties consent.

Pursuant to 28 U.S.C. § 636(c) (2), you are hereby notified of your right to consent to have all further pro-

ceedings in your case handled by United States Magistrate Gansner. Consent forms for this purpose are available from the clerk of the court.

Your decision to give or to withhold such consent is entirely voluntary.

Consent of the parties permits the magistrate to preside over all aspects of your case, but it does not guarantee that the magistrate will preside. The court retains residual authority, on its own motion or for good cause shown, to remove a reference of a case to a magistrate.

Your attention is also directed to the provisions of 28 U.S.C. §§ 636(c) (3)-(5) concerning appeals from judgments of the magistrate.

Joseph W. Skupniewitz
Clerk, U.S. District Court
Western District of Wisconsin